89-875

Supreme Court, U.S.
FILED
DEC 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

ROBERT E. FELKER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

William H. Robinson Jr.
Hiscott and Robinson
900 Scott Street
Stroudsburg, PA 18360
(717) 421-4721

Counsel of Record

3981

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court deny the Petitioner his right to due process of law by erroneously instructing the jury that under 75 Pa.C.S. § 3742--requiring motorists to stop and render assistance after accidents involving death or serious injury--the Petitioner could be convicted on the basis of simple negligence rather than on the basis of a knowing or reckless violation?

2. Did the warrantless search of the Petitioner's vehicle while in police custody, and the seizure of items from its exterior, constitute a violation of the fourth amendment, where the vehicle was itself evidence of a crime and there was ample opportunity to obtain a search warrant?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW . . .	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED .	2
STATEMENT OF THE CASE	6
ARGUMENT	
I. THE PETITIONER WAS DENIED DUE PROCESS BECAUSE THE STATE TRIAL COURT AND APPELLATE COURT INTERPRETED A STATE CRIMINAL PROVISION IN A MANNER WHICH CHANGED THE ELEMENTS OF THE CRIME	12
II. THE SEARCH AND SEIZURE OF ITEMS FROM THE PETITIONER'S VEHICLE WAS VIOLATIVE OF THE FOURTH AMENDMENT BECAUSE THE POLICE FAILED TO OBTAIN A WARRANT	22
CONCLUSION	33
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Arizona v. Hicks, 480 U.S. 321 (1987)	26, 28
Baptist v. Blackburn, 786 F.2d 704 (5th Cir. 1986)	18
Bouie v. City of Columbia, 378 U.S. 347 (1964)	17
California v. Carney, 471 U.S. 386 (1985)	24
Cardwell v. Lewis, 417 U.S. 583 (1974)	25, 26, 29, 30
Chambers v. Maroney, 399 U.S. 42 (1970)	24
Commonwealth v. Kauffman, 323 Pa. Super. 363, 470 A.2d 634 (1983)	20, 21
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	24, 30
Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987), cert. denied, 108 S. Ct. 1012 (1988)	20
In re Winship, 397 U.S. 358 (1970)	16

TABLE OF AUTHORITIES (CONT.)

Cases	Page
Jackson v. Virginia, 443 U.S. 307 (1979)	16
Katz v. United States, 389 U.S. 347 (1969)	24
Patterson v. New York, 432 U.S. 197 (1977)	16
People v. Robinson, 209 Cal. App. 3d 1047, 257 Cal. Rptr. 772 (1989)	27
Prantil v. California, 843 F.2d 314 (9th Cir. 1988)	20
State v. Foster, 110 Idaho 848, 718 P.2d 1286 (Ct. App. 1986)	32
United States v. Harris, 347 U.S. 612 (1954)	17

TABLE OF AUTHORITIES (CONT.)

Statutes	Page
18 Pa.C.S. § 106	21
18 Pa.C.S. § 302	13
18 Pa.C.S. § 305	21
18 Pa.C.S. § 1104	21
75 Pa.C.S. § 3742	12, 21
75 Pa.C.S. § 3743	20

Other

3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.3(b) at 80 (2d ed. 1987) 32

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal was rendered on October 2, 1989, and is set forth in the Appendix at A-1. The decision of the Superior Court of Pennsylvania is set forth in the Appendix at A-2. The opinion of the Court of Common Pleas of Monroe County, which was incorporated by the superior court and attached to its opinion in an appendix, appears in the Appendix at A-34.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a). The final disposition of this case below was the denial of the Petition for Allowance of Appeal filed by the Supreme Court of Pennsylvania on October 2, 1989 (App. at A-1).

CONSTITUTIONAL PROVISIONS INVOLVED

The fourteenth amendment states in part:

> nor shall any state deprive any person of life, liberty, or property without due process of law[.]

The fourth amendment to the United States Constitution states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

75 Pa.C.S. § 3742 states in part:

Accidents involving death or personal injury

(a) General rule.--The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid). Every stop shall be made without obstructing traffic more than is necessary.

(b) Penalties.--

(1) Except as otherwise provided in this section, any person violating this section commits a misdemeanor of the third degree.

18 Pa.C.S. § 302(b) and (c) provide:

General requirements of culpability

. . . .

(b) Kinds of culpability defined.--

(1) A person acts intentionally with respect to a material element of an offense when:

(i) if the element in-

volves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(2) A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(3) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material

element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

18 Pa.C.S. § 1104 states:

Sentence of imprisonment for mis-

demeanors

> A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than:
>
> (1) Five years in the case of a misdemeanor of the first degree.
>
> (2) Two years in the case of a misdemeanor of the second degree.
>
> (3) One year in the case of a misdemeanor of the third degree.

STATEMENT OF THE CASE

Some time during the evening of February 26, 1987, a pedestrian on an unlighted street with no sidewalk in Stroudsburg, Pennsylvania, was struck and killed by a motor vehicle. There were no eyewitnesses to the accident, but several persons living on the street heard what they described as two

thuds, following which the body was found.

The next morning, the Petitioner, Robert E. Felker, read about the accident in the newspaper. He had been driving on the street where the accident occurred at or about the time of the accident and had hit the curb and knew that he had grazed a telephone pole. Felker did not cause any damage to the pole and was unaware at the time of the accident that he might also have struck a pedestrian, who apparently was in the highway. Upon reading the newspaper, Felker first realized that his vehicle might have struck a pedestrian. He immediately contacted his attorney, who called the local police and notified them of what Felker had told him.

After this call, a police officer visited Felker at his place of business and examined Felker's pick-up truck, which showed

signs of having recently been involved in a collision. Felker admitted that the truck was his and that he had been operating the truck the night before.

With Felker's consent, the truck was impounded at that time and, the following day, Pennsylvania State Trooper Richard Sachs conducted a investigation of the accident, including a search of the truck. During his search of the truck, Sachs removed several pieces of physical evidence, including a mirror and grill. This evidence was taken without benefit of a search warrant and without the consent of Felker.

Based upon the evidence seized, Sachs concluded that Felker's truck was the vehicle which struck the victim, and Felker was then charged and following a preliminary hearing was bound over for trial under several statutes: Involuntary Manslaughter

(18 Pa.C.S. § 2504(a)); Recklessly Endangering Another Person (18 Pa.C.S. § 2705); Homicide by Vehicle (75 Pa. C.S. §3732); Reckless Driving (75 Pa.C.S. § 3714); Accidents Involving Death or Personal Injury (75 Pa.C.S. § 3742), Duty to Give Information and Render Aid (75 Pa.C.S. § 3744(a)); and Driving Vehicle at Safe Speed (75 Pa.C.S. § 3361). As a result of a Motion to Quash, the court dismissed the charges of Involuntary Manslaughter, Homicide by Vehicle, and Recklessly Endangering Another Person.

At the suppression hearing, the court denied Felker's Motion to Suppress Physical Evidence (see Record at 16a), ruling that because the officer removed items from the outside of Felker's car where they were plainly visible, no legitimate expectation of privacy interest was implicated and thus no search or seizure took place (App. at A-19).

At trial, the trial court dismissed the counts pertaining to Driving at Safe Speed and Duty to Give Information and Render Aid. At the conclusion of all testimony, the case was submitted to the jury on the two remaining counts, Accidents Involving Death or Personal Injury and Reckless Driving. The trial court instructed the jurors with regard to the hit-and-run statute that Felker could be convicted if they found that "the defendant knew or in the exercise of reasonable care should have known that his truck was involved in an accident resulting in injury or death to a person" (R. at 362a; App. at A-40 (emphasis added)). This instruction was given over the objection of Felker, who argued that it erroneously permitted a conviction on the basis of a simple negligence standard, whereas the statute required a showing of knowledge or recklessness (R. at 376a, 379a).

Felker was ultimately convicted on both counts and was sentenced to one year of probation, a $2,500 fine, and 250 hours of community service. An appeal was taken to the Superior Court of Pennsylvania, which affirmed the convictions, and to the Supreme Court of Pennsylvania, in which Felker argued both that the search of his truck violated the fourth amendment and that "[t]he conviction of Defendant/Appellant based on the civil negligence standard violates both Article I, Section 9 of the Pennsylvania Constitution and the due process clauses of the 5th and 14th Amendments to the United States Constitution" (Petition for Allowance of Appeal at 5; App. at A-58). The Pennsylvania Supreme Court denied Felker's Petition for Allowance of Appeal in a per curiam decision.

ARGUMENT

I. THE PETITIONER WAS DENIED DUE PROCESS BECAUSE THE STATE TRIAL COURT AND APPELLATE COURT INTERPRETED A STATE CRIMINAL PROVISION IN A MANNER WHICH CHANGED THE ELEMENTS OF THE CRIME.

The Petitioner, Robert E. Felker, was convicted for violating the provisions of 75 Pa.C.S. § 3742, which states in pertinent part:

> The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident . . . until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid).

This provision does not, by its terms, provide for any mental culpability or mental state. Therefore, to determine the necessary mental state for a violation of § 3744, the

provisions of 18 Pa.C.S. § 302 must be consulted. This section states generally that, unless otherwise provided, "a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Subsection (c) contains the necessary mental state applicable to this case:

> (c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

(Emphasis added.) "Recklessly" is defined in subsection (b)(3), which provides that a person acts recklessly "when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct" (emphasis added). The

subsection further states that the disregard of the risk must be a "gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

By contrast, negligent conduct is described in subsection (b)(4) as when a person "should be aware of a substantial and unjustifiable risk that the material element exists" (emphasis added).

These provisions make it clear that the Pennsylvania legislature intended a conviction under § 3744 only in those circumstances in which the defendant intentionally, knowingly, or recklessly violated the provision. Significantly, a mere negligent violation is not, under the clear guidelines set forth, sufficient to constitute a violation.

Despite the unambiguous nature of the required mental state for a violation of §

3744, the trial court instructed the jury in this case that mere negligence alone would support a conviction of Felker. In its charge to the jury, the trial court stated:

> The defendant is charged with a misdemeanor offense of violating a provision of the Motor Vehicle Code commonly known as Hit and Run. In order to find the defendant guilty of this charge, you must find that the Commonwealth has proven beyond a reasonable doubt the following elements:
>
> 1. that the defendant <u>knew or in the exercise of reasonable care should have known</u> that his truck was involved in an accident resulting in injury or death to a person.
>
> 2. that the defendant did not stop and remain at the scene of the accident in order to render aid and provide information.

(R. at 363a (emphasis added).) Obviously, the trial court substituted a simple negligence standard in lieu of the recklessness standard required by the statute. Thus, acting on this erroneous instruction, the jury

could well have improperly convicted Felker on the basis that he should have known that he was involved in an accident involving death or injury.

This Court has long recognized that a conviction in state court violates federal due process provisions unless all of the elements of the state crime are proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Patterson v. New York, 432 U.S. 197 (1977); In re Winship, 397 U.S. 358 (1970). In this case, because of the improper jury instruction, all of the elements of the Pennsylvania statute cannot be said to have been proven beyond a reasonable doubt, because the jury was evaluating the case in light of the wrong element of mental intent. Thus, Felker's due process rights were violated by the trial judge and by the refusal of the appellate court to rectify the situa-

tion.

In essence, the due process violation in this case is the same as the failure of a state to give fair warning of the conduct which is criminal under a statute. This Court stated in United States v. Harris, 347 U.S. 612, 617 (1954):

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

In addition, this Court has applied this rule to situations in which the legislation itself was clear, but the courts applying it modified it so as to bring within the scope of the statute conduct which should not have been deemed criminal. In Bouie v. City of Columbia, 378 U.S. 347, 352 (1964), for ex-

ample, the Court stated:

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v. United States, 314 U.S. 306, 311, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

The principle involved in this case was most directly addressed in a recent case from the Fifth Circuit Court of Appeal. In Baptist v. Blackburn, 786 F.2d 704 (5th Cir. 1986), the defendant was convicted of armed robbery in a Louisiana state trial, although there was a conflict in the evidence as to whether the defendant had actually had a gun during the robbery. The trial court instructed the jury that "if the victim thinks the man has a gun and surrenders his money to

him, then it is armed robbery." Id. at 705. However, the statute defining armed robbery required that the robber commit theft by force or intimidation "while armed with a dangerous weapon." Id. Despite this clear error in instruction, the Louisiana Appellate Courts refused to reverse the defendant's conviction.

The Fifth Circuit found that by instructing the jury that armed robbery can result from the victim's mere subjective belief in the presence of a weapon, the trial judge reformulated the definition of the crime. Because the instructions given at trial did not adequately describe the elements of armed robbery as contained in the Louisiana statute, the defendant's right to a fair trial was denied. Id. at 706. In the words of the court:

> Once the legislature of such a state as Louisiana defines a crime,

> due process requires the state's courts to follow its definition or, at the least, to refrain from expanding it to delete significant elements of the definition ex post facto.

Id.; see also Prantil v. California, 843 F.2d 314 (9th Cir. 1988) (recognizing rule that erroneous instructions on state law crime can constitute violation of federal due process clause); Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987), cert. denied, 108 S. Ct. 1012 (1988) (same).

It should be noted that while the trial court and appellate court below relied on Commonwealth v. Kauffman, 323 Pa. Super. 363, 470 A.2d 634 (1983), for the holding that a simple negligence standard was appropriate in a hit-and-run case, the Kauffman case involved a different statute, 75 Pa.C.S. § 3743, which under the legislative scheme is a "summary offense" carrying a different maxi-

mum prison sentence and different culpability standards. See 18 Pa.C.S. § 305 (permitting simple negligence standard in summary offenses); 18 Pa.C.S. § 106(c) (summary offenses include those with a maximum prison term of 90 days). By contrast, the maximum sentence under 75 Pa.C.S. § 3742(a) is one year. See 75 Pa.C.S. § 3742(b)(1); 18 Pa.C.S. § 1104 (defining length of sentence in misdemeanor cases; one year in the case of a misdemeanor of the third degree). Thus, despite the conclusions of the trial court and the appellate courts, the Kauffman case could have no bearing on the culpability requirement in this case.

In short, because of the erroneous jury instruction given by the trial court, Felker was denied his right to a fair trial and his right to due process of law under the fourteenth amendment to the United States Consti-

tution. The appellate court reviewing his conviction merely compounded the error of the trial court by failing to recognize that the trial court had enlarged the elements of the crime by permitting conviction on the basis of negligence rather than on the knowing or grossly reckless standard required by the statute. Because the state courts arbitrarily refused to follow the definition of the crime as contained in the statute, due process requires reversal of Felker's conviction.

II. THE SEARCH AND SEIZURE OF ITEMS FROM THE PETITIONER'S VEHICLE WAS VIOLATIVE OF THE FOURTH AMENDMENT BECAUSE THE POLICE FAILED TO OBTAIN A WARRANT.

In this case, evidence critical to the conviction of Felker was seized after a war-

rantless search of his vehicle, a pick-up truck, while the truck was in police custody. The truck had been impounded by the police after Felker notified them that he had been operating the truck and had struck a telephone pole on the street where the victim had been killed. Not until two days following the accident, however, did an officer examine the truck for evidence. At that time, pieces of the truck's side mirror, grill, and paint were removed and sent to a police laboratory for analysis. Testimony at trial linked this evidence with the death of the victim and provided the evidence which led the jury to believe that Felker's truck had hit the victim.

This Court has long recognized that warrantless searches are per se unreasonable unless supported by one of the specifically established and well-delineated exceptions to

the warrant requirement. Katz v. United States, 389 U.S. 347 (1969); Coolidge v. New Hampshire, 403 U.S. 443 (1971). One of these exceptions identified by this Court is the automobile exception, which provides that under certain circumstances police may dispense with the need to obtain a search warrant to search a motor vehicle because of the inherent mobility and reduced expectation of privacy in motor vehicles. Chambers v. Maroney, 399 U.S. 42 (1970); California v. Carney, 471 U.S. 386 (1985).

The court below ruled that the scraping of paint from Felker's truck and the removal of other physical evidence from the truck was not a search because Felker had no expectation of privacy in the exterior of his automobile. This conclusion was not supported by citations to any relevant case law. In fact, however, the removal of evidence from Felk-

er's truck was a seizure for purposes of the fourth amendment.

This Court has not definitively resolved the question of whether there is a legitimate expectation of privacy in the exterior of a motor vehicle such that the examination of evidence removed from the outside of the vehicle is a search under the fourth amendment. In Cardwell v. Lewis, 417 U.S. 583 (1974), a plurality of the Court upheld the validity of the warrantless examination of tires and removal of paint scrapings from a car, but the actual basis of the holding is uncertain. While the Court stated at one point that "the invasion of privacy, if it can be said to exist, is abstract and theoretical," id. at 592, it then went on to state that "[u]nder circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable

under the Fourth and Fourteenth Amendments." Id. Thus, Cardwell can be interpreted to mean either that there was no legitimate expectation of privacy in the exterior of a vehicle or that there was probable cause to search and thus the Court did not determine the expectation of privacy issue.

As noted above, Cardwell was a plurality opinion, and thus the decision in that case does not have the precedential value of a decision of the majority of the Court. Moreover, since Cardwell, this Court has refined the rules regarding expectations of privacy in such cases as Arizona v. Hicks, 480 U.S. 321 (1987). In Arizona v. Hicks, supra, the Court recognized that while a cursory inspection of an item in plain view did not constitute a search, moving the item to reveal further information produced an invasion of privacy which amounted to a search requiring

probable cause.

Similarly, in this case, while the fact that the officer visually examined the exterior of Felker's truck could be said not to implicate any legitimate expectation of privacy, the removal of evidence for the express purpose of scientific analysis elevated the officer's actions into a search. Drawing the line in this manner makes sense from a practical standpoint; in ordinary affairs, an owner of a vehicle would not have a legitimate expectation that other persons would not look at his vehicle--even very closely--but he certainly would have a legitimate expectation that nothing would be removed from his car without his permission.

This conclusion has been shared by at least one recent state court decision which is in conflict with the lower court in this case. In People v. Robinson, 209 Cal. App.

3d 1047, 257 Cal. Rptr. 772 (1989), the court held under circumstances similar to those in this case that the removal of paint scrapings from a car was a search requiring probable cause. Also analogizing to Arizona v. Hicks, supra, the court concluded:

> [W]e conclude that the officer's conduct in scraping off a layer of paint on appellant's car in order to observe the color of the underlying coat constituted both a "search" and a "seizure" within the meaning of the Fourth Amendment. By scraping off the blue paint, he engaged in an intentional act which had as its purpose the acquisition of physical control over that paint sample. (Brower v. County of Inyo, supra, ___ U.S. at pp. ___, 109 S.Ct. at pp. 1380-1381). Further, that act when done for the purpose of observing the underlying coat of paint involved more than "merely looking at what is already exposed to view, without disturbing it. . . ." (Arizona v. Hicks, supra, 480 U.S. at p. 328, 107 S.Ct. at p. 1154).

257 Cal. Rptr. at 777.

This case thus affords this Court the

opportunity to clarify the principles concerning the expectation of privacy in the exterior of motor vehicles and to resolve a conflict in state cases over the circumstances in which the removal of evidence from the exterior of a vehicle constitutes a search and seizure.

Because of its erroneous ruling that the removal of evidence from Felker's truck was not a search or seizure, the court below did not reach the question of whether the warrantless search was justified. Again, the decisions of this Court are not dispositive on this issue. In Cardwell v. Lewis, supra, the plurality opinion indicated that if a warrantless search of a car which was itself evidence of a crime had been permitted at the time the car was discovered, the delay in searching would have had no bearing on whether a warrant was necessary; however, the

majority of the Court did not reach that conclusion. As noted by Justice Stewart's dissenting opinion in Cardwell, joined by three other justices, the automobile exception was not available to uphold the warrantless seizure of the defendant's car in circumstances where there was "absolutely no likelihood that the respondent could have either moved the car or meddled with it during the time necessary to obtain a search warrant." 417 U.S. at 598.

Of course, in this case there was no chance that the truck would have been moved before a warrant to search it could have been obtained, for the truck had been impounded by the police. The situation is thus even more appropriate than in Coolidge v. New Hampshire, supra, for a finding that the automobile exception to the warrant requirement should not apply. In Coolidge, the plurality

opinion held that since the officers knew that they were going to seize an automobile and could have obtained a warrant in advance, the officers could not rely on the plain view exception to seize the automobile.

The recent automobile exception cases of this Court have stretched the exception to the limits of its original justification--the mobility of motor vehicles--but as of yet the majority of the Court has not ruled in a case in which the automobile itself was the evidence of the crime and there was no possibility that the vehicle could be moved prior to the search without a warrant.

There are weighty reasons for treating a motor vehicle differently if it itself is the evidence of the crime rather than simply the repository of items which are sought in connection with a crime. As pointed out by a leading commentator on fourth amendment is-

sues, the seizure of a car as evidence is more intrusive than the search of the car, and for that reason deserves the added protection of the warrant process. 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.3(b) at 80 (2d ed. 1987); see also State v. Foster, 110 Idaho 848, 718 P.2d 1286 (Ct. App. 1986) (once a car is impounded and immobile, the automobile exception to the warrant requirement is inapplicable, and the validity of the seizure and subsequent search should be judged under standards applicable to containers, not automobiles).

This case thus presents the Court with the opportunity to directly address the precise basis and limits of the automobile exception to the warrant requirement in those situations in which the motor vehicle is itself the evidence of the crime.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Robert Felker, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

William H. Robinson Jr.
Hiscott and Robinson
900 Scott Street
Stroudsburg, PA 18360
(717) 421-4721

Counsel of Record